Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 15, 2016

CLAIM NO. 199874200

STANLEY METHERD PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

COPAR INC.
DR. MICHAEL L. HACK
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Stanley Metherd ("Metherd") appeals from the April 7, 2016, Medical Fee Opinion and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). In the April 7, 2016, Opinion and Order, the ALJ resolved Copar Inc.'s ("Copar") Medical Fee Dispute by concluding only OxyContin "at its lowest dose" is compensable. On

appeal, Metherd asserts the ALJ's resolution of the Medical Fee Dispute is erroneous and not supported by substantial evidence. No petition for reconsideration was filed.

The Form 101 asserts Metherd sustained injuries in the scope and course of his employment on June 29, 1998, in the following manner: "I lifted a radiator weighing 30-40 lbs. and felt my back pop and I had pain in my back and down my left leg."

The August 3, 1999, Award and Order of Kevin King, Chief Arbitrator, reflects Metherd was awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits.

On May 25, 2011, Copar filed a Motion to Reopen and Form 112 Medical Fee Dispute contesting the reasonableness and necessity of Clonazepam and Amitiza. By order dated June 8, 2011, former Chief Administrative Law Judge, Hon. J. Landon Overfield, resolved the medical fee dispute in favor of Copar.

On October 5, 2015, Copar filed a Motion to Reopen and Form 112 Medical Fee Dispute contesting the reasonableness and necessity of Gabapentin, Baclofen,

Oxycodone, OxyContin, Escitalopram, and Tizanidine.[1] Attached to the Form 112 is the September 2, 2015, Utilization Review Notice of Denial of Dr. Albert Olash who stated as follows:

> First, I will address the oxycodone [sic] and OxyContin. Based on Dr. Metherd's [sic] response, he is basing this patient's need for these high dose narcotics solely on the patient's subjective response. There is no documentation that he is basing this on objective evidence on physical exam. There is no documentation that he is basing his treatment on objective diagnostic studies. There is no documentation that he is taking into consideration the description of this man's injury, the objective findings since the injury, and the time that has elapsed since the injury. Instead, his entire treatment seems to be based on subjective response [sic] from the patient. Also, it is noted that his objective abnormality is gleaned from a physical therapist note stating that this man has active evidence of 'pain and limitations.' I do not agree that this is appropriate. Certainly, this man is going to want to stay on narcotics for the rest of his life. He is certainly addicted to the medication at this time. Sometimes, what is best for the patient, the patient does not always agree with. The patient is not trained in medicine and will not understand how many deaths occur every year due to narcotic overdose from prescription medications. The physician, however, is responsible and

[1] At the March 9, 2016, hearing, Copar withdrew Baclofen from the contested medical treatment and modified its challenge regarding OxyContin to contesting anything more than the lowest possible dose.

needs to take these into consideration when he treats these patients. In this particular case, I see no reason for continuing this man on high dose narcotics. The patient should be informed that, at this point in time, he is dependent on the medication not because of pain but because he has been on the medication so long. Certainly, stopping the short-acting oxycodone [sic] will not cause significant withdrawal. The OxyContin then can be slowly tapered. The goal is to get this man completely off the OxyContin, but if not possible, at least get him to the lowest possible dose.

The records still do not document any radiculopathy. There is no reason to keep this man on gabapentin [sic]. Gabapentin can cause balance problems. It is just another medication that decreases his sensorium. He has been on this medication so long that it needs to be tapered off to decrease the likelihood of seizures.

There is no reason for this man to be on two muscle relaxers. Stopping the tizanidine [sic] should not be a problem.

Recommendations:

1. After review of the medical records, including the response by Dr. Michael Hack, it is still my opinion that gabapentin [sic], tizanidine [sic], baclofen [sic], oxycodone [sic], and OxyContin are related to the work injury of June 29, 1998. It is my opinion that Lexapro as an antidepressant medication, is not related to the work injury of June 29, 1998.

2. After review of the medical records, it is still my opinion that this man should not be on oxycodone [sic] and OxyContin. The oxycodone [sic] can be stopped immediately. The OxyContin should be tapered over time to the lowest effective dose. Hopefully, he can be taken off the medication altogether in time. It is my opinion that gabapentin [sic] is not medically necessary and appropriate because there is no objective documentation of radiculopathy. This medication should be tapered off, because if it is stopped abruptly, he could experience rebound seizures. There is no reason for this man to be on two muscle relaxers. Tizanidine can be stopped immediately. He could be maintained on baclofen [sic]. Lexapro (escitalopram) [sic] is not medically necessary and appropriate for treatment of the work injury as depression is not an accepted diagnosis under this claim.

3. After review of the medical records, it is my opinion that the current dose of gabapentin [sic] is not appropriate. This man should not be on gabapentin [sic] at all. This medication should be tapered off.

4. After review of the medical records, it is my opinion that both tizanidine [sic] and baclofen [sic] are not medically necessary and appropriate. Tizanidine should be stopped. Baclofen can be continued as a muscle relaxer for treatment of the work injury.

5. It is my opinion that this man does not need to be on oxycodone [sic] and OxyContin. This man had a strain/sprain of his back 17 years ago. This brought his degenerative disk disease of his spine into disabling reality. High dose narcotics are not medically necessary

> and appropriate for degenerative disk disease of the lower spine. High dose narcotics are medically necessary and appropriate for acute injury such as broken bones or in the postsurgical setting. It is also not medically necessary and appropriate for treating chronic cancer pain. It is not medically necessary and appropriate for treating degenerative disk disease of the spine. Certainly, the short-acting oxycodone [sic] can be stopped immediately. The OxyContin should be tapered off over time.
>
> 6. It is my opinion that this man is on an excessive dose of opioids. The oxycodone [sic] is not medically necessary and appropriate and it should be stopped. The OxyContin should be tapered over time.

In the April 7, 2016, Medical Fee Opinion and Order, the ALJ set forth the following Findings of Fact and Conclusions of Law:

> A telephonic Benefit Review Conference was held on January 12, 2016. The Formal Hearing was held on March 9, 2016 and the matter was submitted on the record for a decision as of March 9, 2016.
>
> Metherd is 66 years old. He appeared at the Formal Hearing on March 9, 2016. He entered and exited the room with the use of a rollator, a cane type device with a wheel on the end. He has a trach and an oxygen tank. According to the medical records, he has a laryngeal voice box as a result of throat cancer in approximately 2004. He treated in pain management with Emily Rayes-Prince, M.D., following his

1998 work injury until she closed her practice and left the area in 2012. He then began treating with Dr. Hack.

Metherd describes his low back pain as sharp and searing. Since his injury, low back pain has persisted with radiculopathy down the left leg initially. Now it goes down both legs. He cannot walk farther than 80 feet, stand longer than 10 minutes or sit longer than 15–20 minutes. He can lift no more than a gallon of milk or his 10 pound oxygen tank. He has tried epidural steroid and trigger point injections with no success. He believes he would be bedfast without his medication. He testified regarding the dosages of each. Regarding the Escitalopram, he began taking it approximately two months after his injury. He did not suffer depression until the work injury occurred and he was no longer able to work and could not pay his bills.

Defendant Employer introduced the September 2, 2015 report of Albert Olash, M.D., who reviewed records and noted the mechanism of injury as an incident where Metherd was lifting 30–40 pounds when he felt a pop in his back. He has had pain since that time. Dr. Olash discussed dangers and risks involved with opioid use and had recommended that Dr. Hack discontinue OxyContin. He also noted the Dr. Hack's medication recommendations were based on subjective complaints. Dr. Hack disagreed with Dr. Olash stating Plaintiff was stable on the current medications. Dr. Hack agreed to switch to either Baclofen or Tizanidine but, after a trial period, he found both taken together were more effective than taking only one. Dr. Olash recommended discontinuing Gabapentin, as there was

no documented neuropathic pain. Dr. Hack disagreed. Dr. Hack did agree to try and taper opioid use although he questioned this suggestion and found the opioids had provided stability for years. Dr. Olash found Oxycodone should be stopped immediately and OxyContin should be tapered to the lowest effective dose. He did not need two muscle relaxers. Tizanidine could be stopped immediately and Baclofen could continue. Lexapro (escitalopram) [sic] was not reasonable and necessary for treatment of the work injury, as depression was not a diagnosis related to the back injury. Gabapentin should be tapered. High dose narcotics are medically necessary for treating acute injuries such as broken bones or for treating chronic cancer patients, but were not appropriate for treating degenerative disc disease. Oxycodone should be stopped and OxyContin tapered over time.

Plaintiff introduced treatment notes from Dr. Rayes-Prince beginning January 14, 2011 and extending through 2012. Metherd had been treating with Dr. Hack, his primary care physician. Dr. Rayes-Prince found the medication regimen appropriate for the work injury which included Neurontin, Oxycontin, Lexapro, Klonopin, and Percocet. He was also taking a host of additional medications for other problems including Doxycycline, Atenolol, Synthroid, Plavix, Pravastatin, Nitroglycerine, Sucralfate, Cytotec, and Lisinopril, potassium chloride, Metformin, Vitamin D and oxygen. He was treating for type II diabetes, hypertension, vascular disease and COPD. He had his larynx removed followed with radiation.

Plaintiff introduced treatment notes of Dr. Hack along with a letter dated November 19, 2015 stating he had treated Metherd for years related to his work injury. His treatment plan had been established by the pain clinic physicians. At least once, Dr. Hack had attempted to taper the medications. He saw no need for attempted physical therapy as Plaintiff reported having attempted all therapies and treatments available to no avail. Dr. Hack found the depression due to the work injury – limited mobility, chronic pain and his predicament. Neurontin treated his radicular pain and worked with narcotic medications.

Dr. Hack testified by deposition on March 3, 2016. He is a family practice physician and began treating Metherd in 2003. He sees him quarterly for prescribed medications. He does not do a pill count and he does no regular urine drug screens. He acknowledged there has been no increase in Metherd's activity level or decrease in his pain complaints. He has made two attempts, 2010 and 2015, to reduce the pain medications but was not successful. He acknowledged there are no physical findings of muscle spasms or reflex abnormalities and methods of treatment are based on Metherd's ongoing complaints of pain. He also discussed the various conditions for which Metherd suffers including morbid obesity, degenerative disk disease, possible spina bifida, laryngeal cancer, COPD and diabetes. However, Dr. Hack attributes Metherd's difficulty ambulating to his back and hip pain.

In a post-judgment Motion to Reopen to Assert a Medical Fee Dispute, Defendant Employer has the burden of proving that the contested medical

expenses and/or proposed medical procedure is unreasonable or unnecessary, while the Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical procedure is causally related treatment for the effects of the work-related injury. *Mitee Enterprises vs. Yates*, 865 SW2d 654 (KY 1993) *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993) *Addington Resources, Inc. vs. Perkins*, 947 SW2d 42 (KY App. 1997). In addition, the legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/or relief". *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).

In the dispute herein, Defendant Employer has challenged the reasonableness and necessity of prescriptions for Oxycontin [sic] (anything more than the minimum dose), Oxycodone, Gabapentin, Tizanidine, and Escitalopram. After careful review of the contrasting medical opinions including strong consideration of the opinions from the treating physician, there is no convincing explanation of a connection between the medications contested and the work injury. Metherd has many problems including morbid obesity, degenerative disk disease, possible spina bifida, laryngeal cancer, COPD and diabetes. The record simply does not support the finding that in spite of all these problems the contested medications are medically reasonable for treatment of an 18 year old non-surgical (arguably strain type) injury. Dr. Hack appears to have taken this man as he found him and continued under the theory of the work injury without a strong objective opinion. The report of Dr. Olash is persuasive

> that the contested medications are not reasonable and necessary for the cure and/or relief of the effects of the work injury and, therefore, non-compensable. It may be the case that the continuation of these contested medications are reasonable and necessary for treatment of the numerous other problems, but not for the 1998 work injury.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id; *see also* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997). There is no question the issue was the reasonableness and necessity of the contested medication; thus, Copar had the burden of proof.

Because Copar, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce

conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). It has been likened to evidence that would survive a defendant's motion for a directed verdict. Kentucky Utilities Co. v. Hammons, 145 S.W. 2d 67, 71 (Ky. 1940).

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, supra. Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion.

Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, supra. As no petition for reconsideration was filed, our sole task on appeal is narrowed to a determination of whether the ALJ's resolution of Copar's Medical Fee Dispute is supported by substantial evidence.

The ALJ relied upon the opinions of Dr. Olash as set forth in the September 2, 2015, report. While there is medical evidence in the record that is contrary to the opinions of Dr. Olash, the ALJ has the discretion to pick and choose amongst the medical evidence in the record. If "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Where evidence is conflicting, the ALJ, as fact-finder, has the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

The ALJ choose to rely upon the opinions of Dr. Olash in resolving the medical fee dispute in favor of Copar, and those opinions constitute substantial evidence. We note that the ALJ's determination that "OxyContin at its lowest dose is found compensable" is consistent with Dr. Olash's opinion: "The OxyContin should be tapered over time to the lowest effective dose. Hopefully, he can be taken off the medication altogether in time."

Accordingly, the April 7, 2016, Medical Fee Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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